

SUPREME COURT OF QUEENSLAND

CITATION: *Joshua Shane Carew v The Office of the Director of Public Prosecutions* [2014] QSC 001

PARTIES: **Joshua Shane Carew**
(Applicant)
V
The Director of Public Prosecutions
(Respondent)

FILE NO/S: 230/14

DIVISION: Trial

PROCEEDING: Application for bail

ORIGINATING COURT: Brisbane

DELIVERED ON: 14 January 2014

DELIVERED AT: Brisbane

HEARING DATE: 9 January 2014

JUDGE: Byrne SJA

ORDER: **Bail granted**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – BAIL – BEFORE TRIAL – OTHER CASES – where the applicant is charged with contravening section 60A(1) of the *Criminal Code* – where applicant must show cause why detention in custody is not justified.

Acts Interpretation Act 1954 s 36, schedule 1
Bail Act 1980 s 16(1), s 16(2), s 16(2)(b), 16(3A)(a), s16(3B)
Criminal Code Act 1899 s (1)(c), s 60A(1), s 60A(3)(c)
Criminal Code (Criminal Organisations) Regulation 2013 s 2

Dale v DPP [2009] VSCA 212
Re Asmar [2005] VSC 487
Sica v Director of Public Prosecutions [2010] QCA 18

COUNSEL: Mr D Meredith for the respondent

SOLICITORS: Griffiths Parry Lawyers for the applicant
Director of Public Prosecutions for the respondent

Bail application

- [1] Joshua Carew (“the applicant”) is charged with a contravention of s.60A (1) of the *Criminal Code*:

“That on the 1st day of November 2013 at Yandina...[he] being a participant in a criminal organisation namely the REBELS Motorcycle Club was knowingly present in a public place namely the Yandina Hotel with two or more other persons namely Paul Jeffrey LANDSDOWNE and Steven Michael SMITH who were participants in a criminal organisation namely the REBELS Motorcycle Club.”

- [2] The trial starts at the Maroochydore Magistrates Court on 24 March. The applicant seeks bail for the 10 weeks or so preceding trial.

Applicant required to show cause

- [3] It is alleged that the applicant was a “participant in a criminal organisation”. So bail must be refused unless he “shows cause why” his “detention in custody is not justified”¹.

Pertinent risks

- [4] By s.16 (1) of the *Bail Act*:

“...a court...shall refuse to grant bail...if the court...is satisfied –
 (a) that there is an unacceptable risk that the defendant if released on bail –
 (i) would fail to appear and surrender into custody; or
 (ii) would while released on bail –
 (A) commit an offence...”

- [5] For the applicant to show cause why his detention in pre-trial custody is not justified it is necessary, although not necessarily sufficient, that there not be an “unacceptable risk” that he would not appear at trial or that he would commit an offence in the meantime².

- [6] By s.16 (2) of the *Bail Act*:

“In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court...shall have regard to all matters appearing to be relevant and in particular...to such of the following considerations as appear to be relevant –

- (a) the nature and seriousness of the offence;
- (b) the character, antecedents, associations, home environment, employment and background of the defendant;
- (c) the history of any previous grants of bail...;
- (d) the strength of the evidence against the defendant.”

¹ s.16 (3A)(a) *Bail Act* 1980.

² cf *Re Asmar* [2005] VSC 487, [11]-[13]; *Dale v DPP* [2009] VSCA 212, [27], fn 15.

Seriousness of the offence

- [7] Conviction would mean imprisonment ranging between the mandatory minimum of six months “served wholly in a corrective services facility” and a maximum penalty of three years³.
- [8] On the prosecution case, for about four hours, the applicant kept company with Paul Landsdowne and Steven Smith – men known to him to be members of the Rebels Motorcycle Club (“the Rebels”) – while seeking to associate with the Rebels as an organisation. It is not suggested that the occasion was used to further other criminal activity.

S.16 (2)(b) factors

- [9] The applicant is aged 30. By trade, he is a builder.
- [10] When arrested in December last year, the applicant was living with his wife and two young children in rented accommodation at 29 Auburn Court, Yandina Creek. His wife’s parents, Michael and Jenny Smith, lived there too.
- [11] By December 2013, Michael Smith had been a Rebels member for a few years. Ten days ago, he resigned his Rebels membership. He claims to have no intention of rejoining the Rebels or of joining any other motorcycle club.
- [12] Steven Smith is the son of Michael and Jenny Smith. In November 2013, he was also a member of the Rebels. He still is.
- [13] Soon after the applicant’s arrest, his family re-located to rented property at 39 Auburn Court, Yandina Creek, where there are two houses. Michael and Jenny Smith live in one; the applicant’s wife and their children live in the other. If admitted to bail, the applicant would live with his wife and children.
- [14] The applicant has many convictions for traffic offences, including unlicensed driving and speeding. The most recent – speeding, on 30 August 2013 – was committed while on bail.
- [15] There are more serious aspects to his past.
- [16] In February 2010, the applicant, then aged 26, and a recreational user of cocaine, was involved in the commercial supply of that dangerous drug.
- [17] As a courier, he delivered two grams of the drug “to someone who was higher up the chain in quite a large organised drug-running operation”⁴. That person was Adam McCrea, the President of the Hervey Bay chapter of the Rebels.
- [18] The applicant was sentenced to imprisonment for 14 months. His sentence was wholly suspended for an operational period of 18 months.
- [19] Unbeknown to the sentencing judge, while the applicant had been on bail in respect of the cocaine supply, on 27 April 2012, he committed three other offences involving unlawful possession of things: amphetamines, explosives and a loaded,

³ s.60A(1) *Criminal Code*.

⁴ As the sentencing judge summarised the criminality.

semi-automatic pistol – all concealed in a vehicle he was driving. The pistol, he told the police, was for “protection”. He was convicted of those offences in the Sandgate Magistrates Court in January last year.

- [20] In July 2013, the applicant was again admitted to bail – this time on a charge of trafficking in methylamphetamine between 1 January 2010 and 4 July 2013. His co-accused are, or at least include, Paul Landsdowne, Michael Smith and Allan Field. That offence is, therefore, alleged to have been committed during the operational period of his suspended imprisonment.
- [21] That drug trafficking charge arises out of an investigation into the Rebels. The primary targets were Paul Landsdowne and Michael Smith. Apparently, their preference was to deal in illicit drugs with fellow Rebels and members of other motorcycle clubs. That feature of the way in which business was transacted matters to the nature and extent of any association between the applicant and the Rebels as an organisation, as distinct from his involvement with people who coincidentally happened to be Rebels with whom he engaged for other reasons: in Paul Landsdowne’s case, as employer or business partner in a retail food outlet; and so far as Michael Smith is concerned, as a father-in-law.
- [22] In March 2013, the applicant and his father-in-law were travelling in a vehicle to the applicant’s home. The vehicle was searched by police. Almost \$15,000 in cash was found. The police then conducted a search of the applicant’s home at Cooroy.
- [23] During a search of the applicant’s bedroom, the police discovered almost \$150,000 in cash in bedside drawers, a set of digital scales, and a spiral bound notebook. The book contained a “tick list”, apparently detailing several substantial illicit drug transactions.
- [24] At the applicant’s home, the police also found a crystalline substance and some powder. The former was methylamphetamine⁵; the latter amphetamine⁶.
- [25] A computer held instructions for mixing chemicals with methylamphetamine. Text messages on the applicant’s phone relate to his drug dealing.
- [26] There are other indications of dealing in amphetamine or methylamphetamine by the applicant, Landsdowne and others. The details need not be explored.

Earlier bail history

- [27] The applicant has not previously failed to appear. He has, however, committed offences when at large on earlier grants of bail.

Strength of the case

- [28] There is a strong case that the applicant was in company with Paul Landsdowne and Steven Smith, whom he knew to be Rebels members, at the Yandina Hotel on 1 November 2013. The Rebels is an “entity”⁷ declared under a regulation to be a

⁵ 5.7g calculated pure weight.

⁶ 5g calculated pure weight.

⁷ cf s.36 *Acts Interpretation Act* 1954 and Schedule 1 definition of “entity”.

“criminal organisation”⁸. So, at trial, the critical issue will be whether the prosecution proves, to the requisite criminal standard, that the applicant was, on that afternoon, a “participant” in the Rebels.

- [29] Section 60A (3)(c) of the *Criminal Code* defines “participant...” to include “a person who (whether by words or conduct, or in any other way) seeks...to be associated with...the organisation”.
- [30] The prosecution case is that the applicant was a “participant...” because, on 1 November 2013, at the Yandina Hotel, he was seeking to be “associated with” the Rebels.
- [31] At the Hotel, the applicant engaged socially with Paul Landsdowne and Steven Smith. Those men – one, an employer; the other, a brother-in-law – have significant, personal connections with the applicant that are unrelated to their Rebels membership.
- [32] The applicant deposes that he has never:
- been a member of the Rebels;
 - sought to join that organisation;
 - attended motorcycle club meetings, functions or rides.
- [33] He does admit to having been to the Maroochydore clubhouse of the Rebels; and recorded telephone intercepts confirm more than one such attendance there. He claims to have been there for reasons unconnected with any aspiration to associate with the organisation: to work as a builder, or to drive family members and friends to their homes.
- [34] Whether evidence of that kind will be adduced at trial is speculative. If not, the prosecution case may be left unanswered.
- [35] How does the prosecution case present?
- [36] There are a few intelligence log entries showing the applicant in company with Rebels members. Those reports do not appear to be of much moment. In any event, the information they contain might not be admissible at trial.
- [37] Accordingly, as things now appear, the prosecution case looks to rely significantly on the applicant’s dealings in dangerous drugs.
- [38] As the cocaine conviction revealed, in February 2010, the applicant was involved in illicit drug activity with the President of the Hervey Bay Rebels chapter. There is no suggestion that the two men had some social, familial or legitimate employment relationship.
- [39] When sentenced for that offence, the applicant was cautioned by the judge to realise how close he came to involvement with “some very dangerous people and some very dangerous criminal activities”.

⁸ See s.1 *Criminal Code*, Definition of “criminal organisation”, para (c); and s.2 *Criminal Code (Criminal Organisations) Regulation* 2013.

- [40] Despite that warning, it seems that he then acted as banker, bookkeeper and warehouseman in a Rebels-centric methylamphetamine distribution enterprise.
- [41] The applicant's participation in the venture may well be explicable on the basis that he was involved with the Rebels "organisation" as a trusted associate.
- [42] The trafficking ceased on 4 July 2013. The prosecution must establish that any striving for association with the "organisation" persisted on 1 November 2013.
- [43] It is difficult to predict the outcome of the trial. So much will depend on the evidence adduced. The prosecution is not assured of success. Rather, the case presents as fairly arguable.

Unacceptable Risk?

- [44] There is not an unacceptable risk that the applicant would fail to appear and surrender into custody. He has substantial family and business ties to the Sunshine Coast. He has not failed to appear when previously granted bail. A residential condition together with conditions requiring regular reporting and prohibiting his obtaining a passport should secure his attendance at trial⁹.
- [45] However, there is a risk that the applicant would commit a serious drug offence if released on bail.
- [46] Neither his bail undertaking nor suspended imprisonment has deterred him from drug offending in the recent past. Moreover, on release, there would likely be a continuing association with his father-in-law, which would increase the danger.
- [47] Still, the trial is imminent. The pre-trial period is about 10 weeks. There is not much time in which to offend¹⁰.
- [48] And the applicant's anxiety not to return to solitary confinement is a substantial incentive not to commit offences.
- [49] All considered, the risk of offending, though real, is not unacceptable.

S.16 (3A) Burden

- [50] The strength of the prosecution case is also material in deciding whether the applicant has shown cause why his continued detention is not justified.
- [51] Where, as here, the prosecution case is not irresistible, the burden, though substantial, is less difficult to satisfy¹¹.

Passport

- [52] The applicant's passport has been surrendered to staff of the Director of Public Prosecutions¹².

⁹ No surety is sought.

¹⁰ If the trial were not to conclude in the near future – for reasons unconnected with the conduct of the prosecution at any rate – it would be a question whether bail should continue.

¹¹ *Sica v Director of Public Prosecutions* [2010] QCA 18, [52].

¹² See s.16 (3A) and (3B) *Bail Act*.

Disposition

[53] In all the circumstances, the s.16 (3A) burden is discharged.

[54] Bail is granted¹³.

¹³ It is unnecessary, for present purposes, to assess the significance of the harsh conditions in which the applicant is held: cf *Dale v DPP* at [35]-[40], [61].